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NTSB Order No. EA-4307

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 14th day of December, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. HAL PAUL JOHNSON, Respondent.	)	Docket SE-13325

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William E. Fowler, Jr., issued on June 7, 1994, following an evidentiary hearing.[1] The law judge affirmed, in part, an order of the Administrator suspending respondent's private pilot certificate, on finding that

[1]The initial decision, an excerpt from the hearing transcript, is attached.

respondent had violated 14 C.F.R. 91.119(a) and 91.13(a).[2] The law judge dismissed other charges that respondent had also violated §§ 91.119(c) and 61.3(a),[3] and the Administrator has not appealed either that dismissal or the law judge's reduction in sanction from the 180-day suspension proposed by the Administrator to one of 60 days. We grant respondent's appeal,

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[2]§ 91.119(a) reads:

> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
>
> (a) Anywhere. An altitude allowing if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

§ 91.13(a) reads:

> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

[3]§ 91.119(c) reads:

> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
>
> (c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

§ 61.3(a) reads:

> (a) Pilot certificate. No person may act as pilot in command or in any other capacity as a required pilot flight crewmember of a civil aircraft of United States registry unless he has in his personal possession a current pilot certificate issued to him under this part[.]

In affirming the § 91.119(a) claim but dismissing the § 91.119(c) one, the law judge did not explain the basis for his different findings. Moreover, he found, as a matter of fact, that respondent had operated below 500 feet, thus raising further question about his dismissal of the (c) charge.

and dismiss the Administrator's order.[4]

The gravamen of the Administrator's complaint is respondent's allegedly too fast and too low flight over Joe Zerbey Airport. According to an eyewitness, respondent flew the aircraft, a Bellanca Viking, at approximately 150 mph and at an altitude of approximately 100-125 feet above the ground.[5] At the time of the sighting, the aircraft was flying above the approximate midpoint of runway 22. The witness viewed the aircraft until it cleared the end of that runway. See Exhibit A-1 diagram. The Administrator's other witness, also an FAA inspector, did not see anything. As pertinent, he testified only to having heard loud aircraft noise. Both witnesses apparently believed that the level of noise was a demonstration that the aircraft was being operated improperly. See Tr. at 40, 77-78.

Respondent explained that he was unhappy with his approach to runway 22,[6] and had determined to do a go-around. He testified that, at the point he was sighted, he had begun to increase his speed and altitude, as in a takeoff, and planned to make another approach to land, this time on runway 29.[7] (He did

[4]Respondent filed an unauthorized reply to the Administrator's reply. We do not consider this document.

[5]The eyewitness was a FAA inspector at the airport that day for another purpose, who at the time was in a building adjacent to the relevant runway.

[6]He had never landed on runway 22 before. It was a 2270-foot grass strip. The airport is a mountaintop plateau and, according to respondent's unrebutted testimony, is apparently susceptible to unexpected wind currents.

[7]Respondent estimated that, at the time the FAA witness saw

so, and landed without incident.)

It appears from the testimony that the FAA inspectors believed respondent was "buzzing" the airfield and had no legitimate reason for flying so low or so fast. Beyond this, the Administrator's primary argument was that respondent's own action in flying too fast and too low made him unable to land on runway 22 and forced the go-around. Therefore, in the Administrator's view, respondent was careless or reckless. Additionally, the Administrator contended that, even were respondent performing a legitimate go-around, he should have been climbing more steeply when he was sighted. See Tr. at 42.

The law judge credited respondent's testimony and found as a matter of fact that respondent was truly executing a go-around, not buzzing the airport, and we find much in the record to support that finding. Significantly, although the Administrator's eyewitness at one point testified to his belief that respondent was in level flight (Tr. at 33), the preponderance of his testimony (see Tr. at 26, 28) acknowledged that respondent's aircraft was in a shallow climb. Notarized statements submitted by respondent's passenger and another eyewitness on the ground (Exhibits R-2 and R-3) confirm the shallow climb and go-around. There is no disagreement that, at the position seen by the Administrator's eyewitness, respondent could not have safely landed the aircraft, but that is not the

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him above runway 22, he was traveling between 125 and 140 mph, and at an altitude of 200 feet, measures not significantly different from those of the FAA witness.

point. Respondent was executing a go-around and, when he was sighted by the FAA inspector, respondent had no intention of landing. Thus, the evidence could not sustain an argument that respondent was flying low over the airport for no legitimate purpose.

The Administrator next argues that the go-around was needlessly caused by respondent's poor preparation for landing. The most obvious problem with this argument is that, when the Administrator's witness first saw the aircraft, it was well past final approach. Respondent was already increasing speed to climb for the go-around. Thus, the Administrator's witness could not testify to the quality or adequacy of respondent's approach, and respondent's self-criticism and desire to perform a better, safer landing do not justify a finding that he was careless simply because he might have been coming in too fast.[8] A botched

[8]A critical difficulty we have throughout the Administrator's case is his almost exclusive reliance on the testimony of an employee that had limited, if any, real knowledge of the Bellanca Viking to make judgments regarding proper speed on climbout and rate of climb. Inspector Mattern's testimony does not garner great weight or reliability when he testifies that, as an absolute matter, the loudness of the aircraft was proof that it was "being controlled in a careless and reckless manner." Tr. at 40. The testimony of the other inspector to the effect that this aircraft was not noisy when compared to a B-25, for example (Tr. at 84), was also not productive. See also initial decision, Tr. at 137. Respondent, in contrast, thoroughly addressed the issue of noise, explaining how and why the Bellanca was a relatively noisy aircraft. Tr. at 107. Respondent's testimony clearly showed him to be more knowledgeable regarding the capabilities and performance generally of the aircraft. See also Tr. at 53 discussion regarding approach speeds, where respondent indicates a normal approach speed of 100-110 mph (which could, not unreasonably, produce speeds of 100-150 mph in the go-around climbout).

approach is not in itself proof of a § 91.13(a) violation.

For similar reasons, we reject the Administrator's argument that respondent should not have the benefit of the § 91.119 exception for low altitude necessary for takeoffs and landings. This argument again misconstrues the scope of the eyewitness evidence, and it seeks to circumvent the law judge's acceptance of respondent's testimony that his low altitude over the runway followed an abandoned landing attempt. In any event, there is no evidence that the approach was unnecessarily low. Inspector Mattern saw no low flight on approach. He saw no approach at all. Moreover, respondent's altitude at the location at which he was sighted was not at all exceptional, in the context of a go-around. And, as noted previously, the Administrator has failed to show that his speed was exceptionally or unnecessarily fast for this aircraft.

The Administrator's final theory -- that respondent did not climb fast enough -- also must fail, both as a matter of law and logic. With the airport environment clear, and the aircraft still directly over the airport (indeed, still over runway 22),

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Further, and despite the obvious ease of submitting an aircraft manual, the Administrator offered no evidence regarding operating specifications for this particular aircraft to show that respondent was operating beyond specified parameters. And, what he did offer -- a magazine article on a different model aircraft, a Bellanca Super Viking -- did not assist his case, as it could be read to support respondent's contention that the aircraft was high performance and that respondent's speed was not excessive, given the aborted landing attempt, for climbing out on a go-around (e.g., Exhibit A-3, at page 49 states that "the Bellanca will motor down final at 100 mph." It also reports, at page 50, that the aircraft can be operated, with landing gear extended, at 160 mph).

respondent chose to increase his airspeed before steepening his climb. The Administrator cites no rule requiring minimum rates of climb and we are aware of none. Nor could the Administrator argue that operating specifications (even using those in Exhibit A-3 that are for a different aircraft) dictated a steeper climb; they merely indicate the best rate of climb and maximum rate of climb. For many reasons, testimony of the FAA inspector that, given this aircraft's capability (based again, on specifications on a different aircraft), respondent was climbing too shallowly is inadequate to support an independent carelessness finding. For one, the manner in which respondent performed the climbout was not shown to have represented an endangerment to anyone or anything.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted; and

2. The Administrator's order is dismissed.

HALL, Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.